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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 220

CHESTER F. JACOBS, as County Treasurer of the County of Suffolk, and the County of Suffolk of the State of New York,

Appellants,

v.

WILLIAM ROGERS and ROSE ROGERS, his wife, PACT REALTY CORP. and TOWN OF BABYLON, of the State of New York,

Appellees.

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v.

PACT REALTY CORP.,

Appellant,

TOWN OF BABYLON of the State of New York,

CHESTER JACOBS, as County Treasurer of the State of New York, and the County of Suffolk of the State of New York,

Defendants-Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Appellants,

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Appellant,

TOWN OF BABYLON of the State of New York,

CHESTER JACOBS, as County Treasurer of the State of New York, and the County of Suffolk of the State of New York,

Defendants-Appellees.

MOTION TO DISMISS OR AFFIRM

The foregoing appeal (Case #220 October Term, 1970) of the appellant Chester F. Jacobs, as County Treasurer

of the County of Suffolk and the appellant the County Treasurer of the County of Suffolk, and the County of Suffolk of the State of New York, from the judgment (Order and Remittitur) of the Court of Appeals of the State of New York entered in the Office of the said Court of Appeals on March 5th, 1970 will be hereafter known as the "County Appeal".

The foregoing appeal (Case #221 October Term, 1970) of the appellant, Pact Realty Corp. from the same judgment as aforesaid will be hereafter known as the "Pact Appeal".

Because the foregoing appeals are taken from the same judgment this single record is used, pursuant to Rule 12 Par. 5 of the Rules of this Court.

The Town of Babylon of the State of New York as defendant-appellant in the New York State Court of Appeals, designated as an appellee in both of the aforesaid "appeals", has *not* joined in the foregoing "appeals" to this court.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

Motion to Dismiss or Affirm

Appellees William Rogers and Rose Rogers his wife, hereafter known as "Appellees Rogers" pursuant to the provisions of Rule 16 of the Revised Rules of this court "Move to Dismiss" both the foregoing "Appeals to this Court" (County #220) and the ("Pact Appeal" #221) from the same Judgment (Order and Remittitur) of the Court of Appeals of the State of New York entered March 5th, 1970 which said Judgment, unanimously affirmed an Order of the Appellate Division of the Supreme Court,

Second Judicial Department, which said Order, modified on the law, and as so modified, unanimously affirmed, the Judgment of the Supreme Court, Special Term, of the Supreme Court of the County of Suffolk of the State of New York, entered January 23rd, 1968, on the grounds that this court lacks jurisdiction under the provisions of 28 U.S.C.A. 1257(2) on direct appeal to this court, to review the foregoing "Final Judgment" of the Court of Appeals of the State of New York, because

(A) The record in this case (Appellants Joint Appendix) stipulated as the whole record to be considered by the Court of Appeals (R 147) and the Order and the Judgment on the Remittitur entered and filed in the Office of the Clerk of the County of Suffolk of the State of New York on April 15th, 1970 (all of which now constitutes the entire record on these Appeals clearly shows to this Court

(a-1) That neither the aforesaid "County Appeal" nor the aforesaid "Pact Appeal" from the same judgment of the Court of Appeals of the State of New York have been taken in conformity to Statute or to these rules.

(B) The record in this case also clearly shows that at no time have the appellants in both of the aforesaid "Appeals", ever attacked or brought into question the *Validity* of any *Statute* of the State of New York, either in the State Courts, or on these "Appeals" as required on direct appeal to this Court, for this court to obtain jurisdiction to review the aforesaid Judgment of the Court of Appeals of the State of New York.

(C) The failure of the appellants in both the "County Appeal" and in the "Pact Appeal" to "attack" or "draw into question" the Validity of Section 71 of Chapter 152 of the Laws of 1929 (New York) which *entire statute* is a part of the Suffolk County Tax Act (hereafter referred to as S.C.T.A.) by a subsequent Legislative Act either in the New York Courts or on these appeals shows a com-

plete failure of Jurisdiction of this Court to review the aforesaid Judgment of the New York Court of Appeals, on direct appeal to this Court.

(D) The failure of the appellants in the "County Appeal" to raise or plead "As an Affirmative Defense" any "Federal Questions" in their pleadings in the Court of New York State, as required by section 3018 (b) of the State of New York, Civil Practice Law & Rules, in the Courts of the State of New York (Appendix A) precludes, said appellants in the "County Appeal" from raising any "Federal Questions" for the first time on their appeals to this Court.

(E) The Federal Questions raised and pleaded by the appellant in the "Pact Appeal" as "A Fourth Affirmative Defense" in its answer to the Amended Complaint of the plaintiffs therein in the State Courts (appellees on these Appeals) and sought to be reviewed herein is insufficient as a "Matter of Law" for the reason that said "Affirmative Defense" as pleaded in the New York State Courts are mere "Conclusions of Law" and as so pleaded in its answer to the Amended Complaint in the New York State Courts does not constitute a valid affirmative defense under New York State Laws.

(F) The record also shows that no Federal Questions were expressly passed upon in any of the New York State Court Decisions, including the New York Court of Appeals in this case.

(G) The construction of Section 71 S.C.T.A. a valid tax statute of the State of New York as determined by Mr. Justice Geiler of the Supreme Court, Suffolk County (R 131-146) did not impair the obligation of the alleged tax sale contract made by County Treasurer of Suffolk County and Pact Realty Corp (appellants herein) for the sale and purchase of the premises herein allegedly sold for second half of 1963/1964 taxes for the reason that a

judicial impairment of a contract is not within the provisions of article 1, section 10, of the United States Constitution.

(H) An examination of the record in this case clearly shows that all of the decisions, judgments or orders of the New York Courts in this case, including the aforesaid Judgment of the New York Court of Appeals rests on an adequate non-federal basis, and that said New York Courts decided this case, entirely upon the construction of New York Statutes; decisions interpreting and construing said Statutes and that it was not necessary for said courts to consider or pass upon any "Federal Questions" to arrive at its decision in this case.

(I) That neither in the "County Appeal," nor in the "Pact Appeal" have the said appellants in their respective jurisdictional statements shown or raised any "Federal Questions" which would give this court jurisdiction to review the aforesaid Final Judgment of the Court of Appeals of the State of New York.

Citation to Opinions Below

The opinions of the Supreme Court, Suffolk County (Mr. Justice Geiler) is not reported (RA131-A146). The opinions of the Appellate Division, Second Department, is reported in 32 A. D. 2d at 929. The decision of the Court of Appeals of the State of New York is reported in 26 N. Y. 2nd 872.

Questions Presented

1. Was there a valid tax sale contract of sale entered into at the time of the alleged tax sale (On November 16th,

---

* Numbers in parentheses, unless otherwise indicated refer to pages in the Record is (RA 131-A146) (Appellants Joint Appendix).

1964) of the Real Property which is the subject of this action by the appellant, the County Treasurer of Suffolk County acting for and on behalf of the appellant, the County of Suffolk, of the State of New York (appellants in Case #220) and the appellant Pact Realty Corp., the tax sale purchaser (Case #221)?

2. Is Section 71 of the Suffolk County Tax Act a Valid Tax Statute of the County of Suffolk of the State of New York?

3. Does the Judgment (Order and Remittitur) of the Court of Appeals of the State of New York entered in said Court on March 5, 1970, impair the Obligation of the alleged tax sale contract as said impairment, is defined in Article 1, Section 10 of the United States Constitution?

4. Did the Taxing Authorities of the County of Suffolk of the State of New York and the Town of Babylon of the State of New York strictly perform the duties imposed upon them by Statute, to be performed subsequent to November 16, 1964, and fulfill the obligations imposed upon them by the terms of the alleged aforesaid contract for the tax sale of the premises which is the subject of this Action?

5. Was there a valid statutory notice pursuant to the "mandatory" provisions of Section 52 of the Suffolk County Tax Act (Appendix A) to redeem the real property which is the subject of this Action, given to the fee owners, the "appellees Rogers" herein prior to the execution and delivery of the Tax Deed by the County Treasurer of Suffolk County, New York to the "Pact Realty Corp.", appellants herein as claimed by the appellant "Pact Realty Corp.", in its Jurisdictional Statement (pp. 12 and 13).

6. Did the failure of the taxing authorities of the County of Suffolk of the State of New York and the town of

Babylon of the State of New York (which said defendant in the State Courts, has not appealed to this Court) to strictly comply with the "Mandatory" and "Jurisdictional" requirements of Sections 71, 70, 75 and 52 of the Suffolk County Tax Act, nullify the "alleged contract of Sale" heretofore set forth?

7. Did the admitted failure of the Taxing Authorities of the County of Suffolk and the Town of Babylon of the State of New York to comply with the foregoing provisions of the Suffolk County Tax Act constitute an impairment of said contract, if said contract exists, as said impairment is defined in Article I, Section 10 of the United States Constitution?

Statement of the Case

This action was originally brought in the Supreme Court of the County of Suffolk of the State of New York by the plaintiffs therein (William Rogers and Rose Rogers, his wife, the appellees in both of the appeals herein) against the defendants Pact Realty Corp. (one of the appellants herein), Town of Babylon of the State of New York (which said defendant has not appealed to this Court), and Chester F. Jacobs, as County Treasurer of the County of Suffolk, appellant herein, and the County of Suffolk of the State of New York, an appellant herein pursuant to the provisions of Article 15 of the Real Property Actions and Proceedings Law Sec. 1501 *et seq.* for the purpose of the determination of the claims to the real property in which is the subject of this action. The amended complaint of the plaintiff in said action is in the record (RA31-A45).

After the joinder of issue, a motion was made by the defendant, in said action, Pact Realty Corp., which was joined in by the other defendants in said action, to dismiss the complaint and the amended complaint of the plaintiffs pursuant to Section 3212 of Civil Practice Law and Rules

(N. Y.) and for Summary Judgment (R 18-19). The plaintiff in said Action (Rogers) the appellees in the appeal herein, made a Cross Motion to strike out the answers of the defendants and for Summary Judgment pursuant to Sec. 2215 of the Civil Practice Law and Rules (N. Y.) (RA92-A94).

The joint motions were argued before Mr. Justice William R. Geiler of the Supreme Court of the State of New York on November 25, 1968 (R 131-145) and as corrected on January 13, 1969 (R 146) Mr. Justice Geiler, rendered his decisions, granting the Cross Motion of the Plaintiffs therein (the appellees) "Rogers" in the appeals herein, for Summary Judgment, on the ground that the tax sale, and tax deed were invalid for the failure of the taxing authorities to comply with the mandatory and jurisdictional provisions of Section 71 S.C.T.A., and denied defendants' motion to dismiss the complaint, and the amended complaint of the plaintiffs.

All of the defendants appealed to the Appellate Division of the Supreme Court, Second Department of the State of New York, and on July 2nd, 1959, an Order was entered by said Court (R 152-153) which said Order unanimously modified, on the law, by inserting in the second ordering paragraph, following the word "answers" the words

> "to the amended complaint; and *by adding a paragraph severing the cross claims of defendant Pact Realty Corporation, against the other defendants*, and as so modified said judgment is hereby unanimously affirmed" (*emphasis supplied*).

The defendants-appellants in the Appellate Division as aforesaid because of the modification appealed to the Court of Appeals of the State of New York, as a matter of right (RA148-149 Pact) (RA150 Town of Babylon) (RA151 County).

The case was argued before the Court of Appeals on February 17, 1970, and on March 5th, 1970, the order of the

Appellate Division appealed from was unanimously affirmed, with costs, no opinion.

The "Record on Appeal" and the Judgment (Order and Remittitur) was filed in the Office of the Clerk of County of Suffolk of the State of New York on April 3, 1970.

On April 15, 1970, the Order on the Remittitur of the Supreme Court of the County of Suffolk, pursuant to the order of the Court of Appeals of March 5th, 1970, was entered and filed in the Office of the Clerk of the County of Suffolk, and on the same day a Judgment on said Order, was also entered and filed in the Office of the Clerk of the County of Suffolk.

By the terms of the "Order on the Remittitur" the Cross-Claims of the Defendant Pact Realty Corp. (appellant herein Case #221) against the Town of Babylon of the State of New York was severed by the "Third" Ordering Paragraph (p. 2) and the Cross-Claim of the Defendant Pact Realty Corp., against appellant herein Chester F. Jacobs, as County Treasurer of Suffolk County and the appellant herein (Case #220) was severed by the "Fourth" Ordering Paragraph of Said Order. (p. 2).

In 32 A. D. 2d 929, the Appellate Division of the Supreme Court, Second Judicial Department of the State of New York, in this case, modified the judgment of Special Term, as heretofore set forth,

> "to permit a determination of the cross claims, a question which was not presented to or decided by the Special Term."

The Severance of the cross-claims, has been accomplished by the terms of the aforesaid Order and Judgment on the Remittitur of the Supreme Court of the County of Suffolk entered and filed in the Office of the Clerk of the County of Suffolk on April 15, 1970, but no affirmative action has been taken by any of the parties in the Severed Cross Claims

(by both of the appellants herein) to seek a determination of their rights as ordered by the Appellate Division and the Court of Appeals of the State of New York, *supra*.

ARGUMENT

POINT I

The appeals from the Judgment (Order and of the Court of Appeals of the State of New York entered March 5, 1970), by the appellants herein have not been taken in conformity with the Provisions of Title 28 U.S.C.A. 1257(2).

The appeals in the case before this Court (County Appeal Case #220) and (Pact Appeal Case #221) October Term, 1970 have been taken to this Court from the Judgment of the Court of Appeals of the State of New York, on direct appeal, pursuant to the provisions of Title 28 U.S.C.A. 1257(2) which is the only Federal Statute, that permits an appellant, to appeal to this Court "on *direct appeal*" from a final judgment of the highest appellate court of a state.

The foregoing "Statute", provides in part that

> "Final Judgments or decrees rendered by the highest court of a state may be reviewed by the Supreme Court as follows . . . (2) 'By appeal, where is *drawn* into *question* the *validity* of a *statute* of any state on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.'
>
> "The aforesaid provisions of said statute are *strictly construed* by this Court, for the reason that this Court has jurisdiction *only* if there is *drawn* into question the validity of a *statute* of any *state* on the ground of its being repugnant to the Constitution,

treaties or laws of the United States and the decision is in favor of its validity."

The appellants in both the "County Appeal" and in the "Pact Appeal", now take the position that Mr. Justice Geiler, by his decisions in the Supreme Court, Suffolk County, New York, which are not officially reported (RA13I-A145) corrected decision (RA146) and the judgment entered thereon (RA11-A17) impaired the obligation of an alleged tax sale contract, alleged to have been entered into on November 16, 1964 by the County Treasurer of Suffolk County on behalf of the County of Suffolk (appellants in the County Appeal) and Pact Realty Corp. (Appellant in the Pact Appeal) for the sale and purchase of the real property sold at the tax sale for the tax year 1963/1964.

The appellant in the "Pact Appeal" (pp. 8 and 9) of their jurisdictional statement admit that there is *no impairment* of the aforesaid contract by any subsequent New York State *legislation* under the Doctrine of *Wood* v. *Lovett,* 313 U. S. 362, 369, nevertheless, it contends at p. 9 that

> "It is no less an impairment of the obligation of the tax sale contract, if the same result (divestiture of appellant's contract rights) is achieved by Special Term's construction of *existing* statutes." (Post 1959 § 70 and § 71 SCTA)

The appellants in the "County Appeal" also take the same position in their jurisdictional statement by their statement on p. 8:

> "The contracting parties are subject to the *law* in force at the time, and it is not contended *any* subsequent *legislative* action *impaired* the contract, and on pp. 9 and 10 where it is further stated
>
> 'It is submitted the New York Court of Appeals erroneously applies *law* to a statute so that it re-

> sults in the unconstitutional impairment of a contract, and by cancelling a recorded deed; deprives a party of property without due process of law.' "

It is well settled law, that where the contract clause in U.S.C.A. Const. Article 1, Sec. 10, cl. 1, was not relied on in proceeding in State Court, question thereunder could not be presented on appeal to the United States Supreme Court, *Gibbs* v. *Zimmerman,* S. C. 1933, 54 S. Ct. 140, 290 U. S. 326, 78 L. Ed. 342. In the case of *Cardinale* v. *Louisiana,* decided April 1, 1969, 394 U. S. 437, 22 L. ed. 2nd 398; 89 S. Ct. 1162, this court held in 394 U. S. 437, 438:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet 368, 9 L Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, § 25, 1 Stat 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails' 10 Pet 368, 391 9 L Ed 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v. Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819), and since, e. g. Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc., 360 U. S. 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); State Farm Mutual Automobile Ins. Co. v. Duel, 324 U. S. 154, 160-163, 89 L Ed 812, 817-819, 65 S Ct 573 (1945); McGoldrick v. Compagnie Generale Transatlantique, 309 U. S. 430, 434-435, 84 L Ed 849, 851-852, 60 S Ct 670 (1940); Whitney v. California, 274 U. S. 357, 362-363, 71 L Ed 1095, 1100-1101, 47 S Ct 641 (1927); Dewey v. Des Moines, 173

U. S. 193, 197-201, 43 L Ed 665, 667-668, 19 S Ct 379 (1899); Murdock v. City of Memphis, 20 Wall 590, 22 L Ed 429 (1875)."

The court further stated at page 439:

"In addition to the question of jurisdiction arising under the statute controlling our power to review final judgment of state courts, 28 USC §1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v. Ohio, 385 U. S. 92, 17 L Ed 2nd 189, 87 S Ct 252."

The record in this case (Appellants' Joint Appendix) shows that at no time in their pleadings (verified answer RA71-A73), to the amended complaint of the Plaintiffs in this action (RA31-A52 with exhibits) or in their verified answer to the cross claim of the appellant Pact Realty Corp., have the appellants in the "County Appeal" ever raised or relied upon any "federal questions" in the state courts.

That as a result, as will be pointed out in Point III, a federal question cannot be raised for the first time on this appeal (County Appeal).

That "Pact" in its answer to the amended complaint, attempted to raise a federal question in general terms

(RA59-A60) that

1. Any nullification of the deed of the defendant Pact Realty Corp. * * *, would deprive the defendant Pact Realty Corp. of its constitutional rights.

(a) Article 1, Sec. 10 of the United States Constitution

(b) Amendment V of the United States Constitution.

In the case of *Stembridge* v. *Georgia,* 343 U. S. 541, 96 L. ed. 1130, 72 S. Ct. 834, in which case the 14th Amendment to the Constitution of the United States (Code Sec. 1-815), guaranteeing to all persons equal protection of the law was claimed to have been violated, the Court stated (343 U. S. 541, 547):

"It is apparent from the record that the Supreme Court of Georgia took no action upon the question of federal constitutional rights raised for the first time on the motion for rehearing in the Court of Appeals. This was in accord with its rule that constitutional questions must first be raised in the trial court. Beckmann v. Atlantic Ref. Co., 181 Ga. 456, 182 SE 595. The attempt to raise the question of constitutional rights in the general terms of the above quotation from the petition for certiorari did not begin to meet the requirement of the Supreme Court of Georgia for definiteness. Persons v. Lea, 207 Ga. 384, 61 SE 2d 832.

At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment. Hedgebeth v. North Carolina, 334 U. S. 806, 92 L ed 1739, 68 S Ct 1185; and other cases cited therein."

The appellant "Pact" in the "Pact Appeal" also rely upon the case of *Williams* v. *Bruffy,* 96 U. S. 176, 183, 24 L. Ed. 716 as authority for its contention that "any act, from whatever source originating, to which a state gives the *force* of law, is a law of the state within the meaning of the contract clause of the United States Constitution" (J. S. p. 8).

This Court has held that "The policy against premature constitutional adjudications demands that any doubts in maintaining appellants' burden of establishing United States Supreme Court's jurisdiction be resolved against jurisdiction", *Republic Natural Gas Co.* v. *State of Oklahoma,* Ok. 1948, 68 S. Ct. 972, 334 U. S. 62, 92 L. ed. 1212. See also *Department of Mental Hygiene of Cal.* (1965), 85 S. Ct. 871, 380 U. S. 194, 13 L. Ed. 2d 753; *Gorman* v. *Washington University,* Mo. 1942, 62 S Ct. 962, 316 U. S. 98, 86 L. ed 1300, rehearing denied 62 S. Ct. 1272, 316 U. S. 711, 86 L. Ed. 1777.

In the case of *King Mfg. Co.* v. *Augusta,* 48 S. Ct. 489, 277 U. S. 100, 72 L. ed. 801, Mr. Justice Van Devanter, delivered the opinion of this Court and in 277 U. S. 100, 102, he stated:

> "The jurisdiction of this Court to review on writ of error, judgments, or decrees of state courts of last resort is defined by § 237(a) of the judicial code as set forth in the amendatory act of February 13, 1925 * * * U.S.C. title 28 § 344 as there defined this jurisdiction applies to two classes of cases—
>
> (1) 'where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity'
>
> (2) 'Where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity.

Plainly the present case is not within the first provision. Is it within the second? This depends on the sense in which the words, 'a statute of any state are used.' If they are used as narrowly comprehending only an enactment of the state legislature, the case is excluded, but if they are used, as broadly comprehending any *legislation* proceeding from the *law* making agencies of the state the case is included.

In usage "statute" is a term which has both a restricted and a broad signification. This is reflected in the following excerpt from Bouviers Law Dictionary, Rawles Revision.

STATUTE. A law established by the act of the legislative power. An act of the legislature. The written will of the Legislature, solemnly expressed according to the forms necessary to constitute it the law of the state: . . . at page 103. It is further stated:

'This word is used to designate the written law in contradistinction to the unwritten law.

Among the *civilians*, the term "statute" is generally applied to laws and regulations of every sort; every provision of law which permits or prohibits *anything* is designated as a statute, *without* considering from what source it arises' * * *

"It of course rests with each state to determine in what *form* and by what *agencies* its *legislative power* may be *exerted*. It may legislate little or much in its constitution, may permit the electorate to make laws by direct vote, may entrust its legislature with wide law-making functions and may delegate legislative authority to subordinate agencies, such as municipal councils and state commission."

In commenting on the case of *Williams* v. *Bruffy*, Mr. Justice Van Devanter stated at page 107:

"Williams v. Bruffy, 96 U. S. 176, 24 L. ed 716, is the first case in which, the phrase 'Statute of any State'

in the jurisdictional provision was considered and construed. There a debt arising on contract and owing by a citizen of Virginia to citizens of Pennsylvania, had been sequestered during the Civil War under an enactment of the Confederate States and collected from the debtor by that government. After the war the creditors brought a suit in a state court in Virginia to collect the debt" * * *

The defendants interposed pleas setting up the sequestration and collection under the confederate enactment. Judgment went for the defendant on these pleas over the plaintiff's objection, that the confederate enactment was invalid under the constitution. * * * and at page 108 the court further stated:

"By the only authority which can be recognized as having any legal existence, that is the State of Virginia, this act of the *unauthorized confederation* was *enforced* as a law of the *Commonwealth.* Its validity was drawn in question on the ground that it was repugnant to the constitution, and the decision of the Court below was in *favor* of its *validity.*"

That in the case of *Banque of France* v. *Equitable Trust Co.,* 33 F. 2nd 202. Mr. Justice Goddard stated in his opinion at page 206:

"The decrees and laws of the Confederate States were recognized as *valid* by the Supreme Court unless public policy and justice required otherwise," citing among other cases *Williams* v. *Bruffy, supra.*

That in the case of *Nixon* v. *Condon,* 34 F. 2nd 464, 467, 468, it is stated:

"Plaintiff further alleges that following such decision of the Supreme Court in Nixon v. Herndon, supra, the Legislature of Texas by the act approved June 7, 1927, specially repealed article 3093 (A) and enacted

Article 3107, being Chapter 67 of Laws of Texas of 1927..

"It was contended by the plaintiff that said Act 3107 was unconstitutional in that it is sought and intended thereby to delegate to state executive committees, of Political parties in Texas power to exclude colored persons, from voting at primary elections. * * *.

"The Court held that said Article 3107 provides no action by a state, and directed that no action be taken upon the part of any person or individuals, that is prohibited by either the Fourteenth Amendment or Fifteenth Amendment, under decisions of the Supreme Court of the United States above cited.

"The Court further held that the action could not be maintained unless 'the defendants * * * were acting as officials of the State of Texas, in the name of the state.' In each of the cases Nixon v. Herndon, 273 U. S. 536, 47 S. Ct. 446, 71 L. ed. 759, citing many other cases, and William v. Bruffy, 96 U. S. 176, 24 L. ed. 716, *and other cases cited,* and relied upon by the plaintiff herein, examination of the facts disclose that the action complained of was based upon *some law* enacted by the *legislative* department of a state, by a municipal corporation, some commission or body corporate, or some person or individual, as an official of the state, acting in his official capacity, each being state officers, holding official position *under the state* as a governmental body, acting as such in the name of the state, and *not* as private individuals.

"On the appeals to this Court (County and Pact) it appears to be clear that, the claim made by both appellants herein that an impairment of the alleged contract herein, was accomplished by Mr. Justice Geiler, Supreme Court, Suffolk County, N. Y., within the provision of Article 1, Section 10 of the United States Constitution is untenable."

That in the case of *Home Building & Loan Asso.* v. *Blaisdell,* 290 U. S. 398, 429, 78 L. Ed. 413, 423, 34 S. Ct.

231. Mr. Justice Hughes, delivered the opinion of the Court in 290 U. S. 423, 429, he stated:

> "The obligation of a contract is the *law* which binds the parties to perform their agreement. Sturges v. Crowninshield, 4 Wheat 122, 197, 4 L. ed. 529, at page 431 he further stated:
>
> "The obligations of a contract are impaired by a *law* which renders them invalid, or releases or extinguishes them (Sturges v. Crowninshield, supra, * * * and impairment as above noted has been predicated. of laws which without destroying contracts derogate from substantial rights)."

Pact's interpretation of the law of the case of *Williams* v. *Bruffy, supra,* as claimed in "Pact's" Jurisdictional Statement (p. 8) as applied to the facts in this case on appeal goes far beyond the actual holding in the said case.

It was decided in the *Williams* v. *Bruffy* case, *supra,* that:

> "Any *enactment* from whatever source originating to *which* a *state gives* the force of *law* is a *statute* of the state, within the meaning of the clause cited relating to the jurisdiction of this Court."

The appellants in this case both the "County" and "Pact" are attempting to extend the holding in the *Bruffy* case, *supra,* to include "a judicial decision", upon which the final judgment of the Court of Appeals entered on March 5, 1970 was predicated, and as a result it must now be determined:

> "If the final judgment of the Court of Appeals of the State of New York construing a valid Tax Statute of the State of New York (Suffolk County Tax Act) is within the impairment of the contract clause of the United States Constitution (Art. 1, Sec. 10, par. 1)."

The answer to this question is a definite "No" as determined by Mr. Justice Taft in the case of *Fleming* v. *Fleming* (Iowa), 44 S. Ct. 246, 264 U. S. 29, 68 L. Ed. 547, 549, he stated:

> "In Tidal Oil Co. v. Flanagan, decided January 27, 1924 (263 U. S. 444, Ante. 382, 44 S. Ct. Rep. 197), we had occasion to consider the same issue. After a somewhat full examination we held that by a score of decisions in this Court, a judicial impairment of a contract obligation was not within Sec. 10, Article I of the constitution, since the direction was directed only against *impairment* by *legislation,* and that such judicial action presented no federal question of which this court could take jurisdiction on a writ of error, from a state court * * *
>
> In other words the contention is that the same statute was one *law,* when first *construed* before the making of the contract and has become a new and different act of the legislature by a later decision of this Court. This is *ingenious,* but *unsound.* It is the same *Law.* The effect of the subsequent decisions is not to make a *new* law, but only to *hold* that the law *always meant,* what the court now says it means. The Court has power *to construe* a legislative act, but it has *no* power, by a change in construction, *to date* its passage, as a *law* from the time of the later decision. A statute in force at the time a contract was made, cannot be made a subsequent statute through new interpretation by the Courts." (Emphasis supplied)

In the *Flanagan* case, *supra,* Mr. Justice Taft, also delivered the opinion of the Court in 68 L. Ed. 385, 386, he

stated:

> "It has been settled by a long line of decisions[1] that the provision of Sec. 10, Article I of the Federal Constitution protecting the obligation of contracts against *state action* is directed only against *impairment* by *legislation,* and not by judgments of the Courts. The language 'No state shall . . . pass any law impairing the obligation of a contract—plainly requires such a conclusion.' However the fact, that it has been necessary for this court to decide the question so many times is evidence of the persistent error in regard to it. Among the cases relied upon to sustain the error are Gelpcke v. Dubuque, 1 Wall 175, 17 L. Ed. 520 citing many cases—Los Angeles City Water Co., 177 U. S. 558, 44 L. Ed. 886, 20 Sup. Ct. 736. These cases were not writs of error to the Supreme Court of a state. They were appeals or writs of error to the Federal Courts where recovery was sought upon municipal bonds or other forms of contract * * *. In such cases the Federal Courts exercising Jurisdiction between citizens of different states, held themselves to decide what the state law was and to enforce it as laid down by the state supreme court, before the contracts were made, rather than in later decisions. They did not base this conclusion on Article I, Sec. 10 of the Federal Constitution, but on the state law as they determined it."

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[1] *Knox* v. *Exchange Bank W. Va., 1895,* 16 S. Ct. 80, 159 U. S. 103 40 L. Ed. 91; *Commercial National Bank* v. *Buckingham,* Ohio 1847, 46 U. S. 317 57 How. 317, 12 L. Ed. 169; *Commercial Bank* v. *Buckingham,* 5 How. 317, 343, 12 L. ed. 169, 181; *Mississippi & M. R Co.* v. *Rock,* 4 Wall. 177, 181, 18 L. ed. 381, 382; *Mississippi & M. R. Co.* v. *McClure,* 10 Wall. 511, 19 L. ed. 997; *Knox* v. *Exchange Bank,* 12 Wall. 379 383, 20 L. ed. 414, 415; *Lehigh Water Co.* v. *Easton* 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.,* 125 U. S. 18, 30, 31 L. ed. 607, 612, 8 Sup. Ct. Rep. 741.

and at page 387, the court further stated:

> "This Court has always held it is a prerequisite to the consideration of the federal question in a case coming from a state court that the question should have been *raised* in that court *before decision* or that it should have been actually entertained upon petition to rehear."

In the cases on appeal herein, there was no motion made for reargument, nor was any writ of certiorari applied for, instead allegedly pursuant to 28 U.S.C.A. 1257(2) a direct appeal has been taken in this court.

The Appellate Jurisdiction of this court upon writ of error to a state court on the grounds that the obligations of a contract has been impaired can be invoked only when an act of the legislature alleged to be repugnant to the constitution of the United States has been decided by the State Court to be valid and not when an act admitted to be valid, has been misconstrued by the court, *Central Land Co.* v. *Laidley W. VA., 1895,* 16 S. Ct. 80, 159 U. S. 103, 40 L. ed. 91.

That from the foregoing it seems to appear it has no jurisdiction to review the aforesaid judgment of the Court of Appeals of the State of New York entered on March 5th, 1970.

1. That section 71 of the Suffolk County Tax Act is admitted to be valid by the appellants in both the "County and Pact Appeals".

2. That it is also admitted that the alleged contract herein was not impaired by any subsequent legislative act or any other act which the state of New York has given the "force of law".

3. The construction of Sec. 71 S.C.T.A. by Mr. Justice Geiler of the Supreme Court, Suffolk County, New York did not impair the obligation of the alleged contract herein,

as said impairment is defined under Article 1, section 10 of the United States Constitution.*

POINT II

No valid contract for the tax sale of the "Premises" herein, was entered into by Chester F. Jacobs as County Treasurer of the County of Suffolk (appellants) in the County Appeal and "Pact Realty Corp." the appellant in the Pact Appeal on November 16, 1964.

> "The appellants in both the 'County Appeal' and the 'Pact Appeal claim that' a valid contract for the sale of the premises at a tax sale for the 1963/1964, taxes, was entered into by the 'appellants' in the County Appeal as vendor and the 'Pact Realty Corp.', as vendee on November 16th, 1964 the date of the tax sale for 1963/1964 taxes allegedly due thereon."

"The appellant in the Pact" appeal stated on Page 12 par. 3 in its Jurisdictional Statement "One must look to SCTA for legislative intent, as to what kind of notice they were entitled to *after the* tax sale, in order, that they would receive due process.

The validity of a tax title depends on strict compliance by the taxing authorities with every mandatory statute in the chain of title.

Among those statutes which must be strictly complied with after the date of the sale are Sections 70, 71, 75 and 52

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* *Knox* v. *Exchange Bank W. Va.*, 1895 16 S. Ct. 80, 159 U. S. 103, 40 L. Ed. 91; *Commercial National Bank* v. *Buckingham, Ohio*, 1847, 46 U. S. 317, 57 How. 317, 12 L. Ed. 169; *Commercial Bank* v. *Buckingham*, 5 How. 317, 343, 12 L. Ed. 169, 181; *Mississippi & M. R. Co.* v. *Rock*, 4 Wall. 177, 181, 18 L. Ed. 381, 382; *Mississippi & M. R. Co.* v. *McClure*, 10 Wall. 511, 19 L. Ed. 997; *Knox* v. *Exchange Bank*, 12 Wall. 379, 383, 20 L. Ed. 414, 415; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 30 L. Ed. 1059, 7 Sup. Ct. Rep. 916; *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.*, 125 U. S. 18, 30, 31 L. Ed. 607, 612, 8 Sup. Ct. Rep. 741.

of the Suffolk Tax Act, and certain sections of the Real Property Tax Law of the State of New York which are incorporated in Section 52 entitled "Notice of Unredeemed Real Estate, Notice to Redeem", which said mandatory statutes by their terms could only be complied with by the taxing authorities subsequent to the date of the tax sale.

The sections of the real property Tax Law incorporated into Section 52 of the Suffolk County Tax Act are Sections 1014(1) and Section 1010(1)(a) Real Property Tax Law (N. Y.) (Appendix A).

The appellants in both appeals from the final judgment of the New York Court of Appeals, rely upon the case of *Wood* v. *Lovett*, 313 U. S. 362, 369, as authority for their contention in this case as stated in Pacts' jurisdiction statement "that a contract resulted at the 11/16/64 tax sale between the Suffolk County Treasurer who sold the subject property to appellant" (p. 8, Par. 1).

In that case the State had already acquired title in 1933. The land was not redeemed and was certified to the State as owner. In 1936, the Commissioner of State Lands, on behalf of the State, by *deeds* reciting his *statutory* authority to do so, conveyed to the appellants all the right, title and interest of the State in two parcels of land (313 U. S. 362, 365).

The power and authority of the Commissioner of Lands to convey was not questioned by this Court, for the reason that the record shows such authority to sell existed (pp. 366, 367), and at page 370 the Court further stated:

> "the laws which subsist at the time of the making of a contract, and where it is to be performed, enter into and become a part of it, as if they were expressly referred to or *incorporated* in its terms,"

and in the case of *Home Building & Loan Assoc.* v. *Blaisdell*, 290 U. S. 398, 430, in addition to the above this court stated:

"This principle embraces alike, those which affect its validity, *construction,* discharge and enforcement."

There is no question of the fact that Section 71 SCTA is one of the statutes (laws) which form a part of the contract herein for the reason that it became a part of the Suffolk County Tax Act by Chapter 152 of the Laws of 1929, and has not been amended to date (RA137).

There is a vast difference in the statutory procedure or authority that must be complied with by a taxing official (such as the County Treasurer, in this case) to enter into a contract to sell property already acquired at a tax sale by a quit claim deed to a purchaser, as in *Lovett* case, *supra,* page 370 and the statutory authority, if any, which would permit, as in this case a County Official, of the County of Suffolk, County Treasurer, to enter into a binding contract on behalf of the County of Suffolk of the State of New York, with a purchaser for the tax sale of real property sold, at a tax sale, the *fee title* to which was still vested in the *fee owner.*

In the first instance, it must be assumed that the tax title acquired by the state, was immune from attack in fact, this Court stated in the *Lovett* case *supra* at page 368:

> "That Act of 1935 must be viewed in the setting of the *statutory* scheme of taxation, sale of forfeited lands to the State, and sale in turn by the State. Its purpose was to assure one willing to purchase from the State a title immune from attack on grounds theretofore available."

The appellants in the "County Appeal" and the "Pact Appeal," herein, from the Judgment of the New York Court of Appeals, herein, have the burden to show affirmatively that this Court has jurisdiction to review the aforesaid judgment. *Gorman* v. *Washington University,* Mo. 1942, 62 S. Ct. 962, 316 U. S. 98, 86 L. ed. 1300.

In the cases on appeal herein, the record is *barren* of any facts or proofs whatsoever, which would show to this

Court that the appellant, the County Treasurer of the County of Suffolk, *had* any *power* or *authority* whatsoever to *enter* into any *contract* for the sale of any tax sale property, the title to which had *not* been previously acquired by the County.

The only power and authority the County Treasurer has under the provisions of the Suffolk County Tax Act is that pursuant to part of Section 53 after all the tax sales proceedings have been completed, is to execute "a conveyance of the real estate so sold, which conveyance shall vest in the grantees and absolute conveyance of real estate, in fee * * *. Every such conveyance shall be attested by the County Treasurer * * * and when so executed shall be *presumptive evidence* that the sale was regular and also *presumptive evidence* that all proceedings prior to the sale, including the assessment of the lands sold, and all *notices* required by *law* to be given previous to the expiration of the time allowed by law for the *redemption* thereof were regular, and according to law."

A reading of the foregoing provisions of Section 53 SCTA appears to be conclusive proof that the County Treasurer of Suffolk County had no authority to enter into a contract on 11/16/1964 the date of the tax sale herein.

In addition there is further proof of the lack of power and authority in the "County Treasurer's Deed" (RA63-69) accepted by the tax sale purchaser herein to enter into said tax sale contract on 11/16/1964, as set forth (RA67) as follows:

> "to have and to hold the same to the party of the second part, its, his or her distributees, successors and assigns forever, subject however, to the rights, claims, encumbrances, or liens, if any; of others remaining or existing under notwithstanding, or by virtue of the *statutes* applicable to such *taxes, tax sales,* and *issuances* of this conveyance."

That it is respectfully submitted to this Court that regardless of the fact, that there *may* have been a contract

entered into on 11/16/1964, the terms and obligations of said contract were merged in the foregoing tax deed, and by the terms of said tax deed which was *accepted* by the *tax sale purchaser,* the subject property at that time was still subject to the mandatory provisions of the Suffolk County Tax Act affecting tax sales, *post.*

As a result of the failure of the taxing authorities to comply with the strict provisions of Section 71 of the SCTA, the Statute in this case, and Section 52 SCTA which will be set forth in the following point it affirmatively appears that at least two of the links in the tax chain of title have been broken, and as a result, the tax sale purchaser obtained no tax title to the subject property.

That in addition, the fact, that the tax chain of title was broken, as heretofore set forth no valid contract ever came into existence, and as a result there was no obligation which could be impaired, within the clause of impairment of a contract as defined by Article 1, Section 10, Par. 1 of the United States Constitution.

That in the case of *John S. Knox* v. *The Exchange Bank of Virginia,* 79 U. S. 379, 12 Wall 379, 20 Led. 414, Mr. Justice Miller delivered the opinion of the Court and in 20 Led. 414, 415, stated:

> "But we are not authorized by the Judiciary Act to review the judgments of the state courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. *If we did,* every case decided in a state court, *would be brought here,* when the party setting up a contract alleged that the Court had taken a different view of its obligation to that which he held, as this court said in Railroad Co. v. Rock, 4 Wall 181, 182 Led. 382, it must be the Constitution, or statute, which impairs a contract, or the case does not come within our jurisdiction. See also Railroad Co. v. McClure, 10 Wall. 511; 19 L. ed. 997."*

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* See *Tidal Oil* v. *Flanagan, supra; Commercial Bank* v. *Buckingham,* 5 How. 317, 343, 12 L. 169, 181.

The principal arguments of the appellant, Pact Realty Corp., appellant in the "Pact" Appeal are: (1) That "Pact" was vested with property rights at the tax sale, and (2) Special Term divested "Pact" of its property rights in violation of its constitutional rights.

The foregoing arguments are untenable and are based on the false premise that the Buyer at the time of the tax sale, acquires title to the real property covered by said tax sale, subject only to being divested by the redemption of said tax sale by the fee owner. This is not true. The sale itself is in no sense a conveyance of real property. Nothing is more demonstrative of the proposition, that it is not a conveyance of real estate tax sale property, than the tax statute itself which provides that the buyer at the tax sale will not receive a deed until thirty-six months *after* the date of the sale.

POINT III

The failure of the appellant "Chester F. Jacobs, as County Treasurer of the County of Suffolk" and the appellant "The County of Suffolk of the State of New York" and defendants in the State Courts N. Y. to plead any "Federal" or "Constitutional Question" in their joint "Answer" to the Amended Complaint as an "Affirmative Defense" in the Courts of the State of New York precludes the raising of said Questions "for the first time on this appeal" (County Appeal Case No. 220) (October Term, 1970).

The appellants on this Appeal (County appeal No. 220) admit in their Jurisdictional Statement (p. 4) (hereinafter referred to as (County J. S. 3) that the "Federal Question" sought to be reviewed was raised in the Court of first instance by an "Affirmative Defense" in pleading (Record) appellants Joint Appendix by stipulation A147 in the answer of Pact (R, pp. A59-A60) and that it is their claim that the Supreme Court of the State of New York passed upon the Federal Question "by striking the answers of

all the defendants" and granting the relief demanded in the amended complaint (RA15, A44-45) by voiding the tax sale as well as the tax deed.

The question whether a federal question was pased upon or not will be left for future consideration.

The only question to be considered under this point is:

Do the appellants on this Appeal (Case #220) have the right to raise a "Federal Question" on this appeal, for the first time, which they failed to plead as an "Affirmative Defense" in their answer (RA71, A72) to the amended Complaint in this action?

The anwser to the above question is "No" for the following reasons:

The "Federal Question" claimed to have been raised by the "appellants" in the "County Appeal" was admittedly not raised in their pleadings in the State Courts, except that, it is now claimed by said "appellants" that it "can now adopt" the "alleged" "Federal Question" raised by Pact in the State Court (RA59, A60).

Under the Law of the State of New York, what matters must be pleaded as an "Affirmative Defense" in an answer to a complaint is mandated by Section 3018 (B) of the Civil Practice Law and Rules of the State of New York (Appendix A).

It is to be "noted" that nowhere in the "County J. S." is it claimed that any affirmative Defense was pleaded or raised by the appellants on this appeal other than as above stated (Pacts Answer, RA59-A60).

Section 3018 (B) provides in substance that "any matter" which would take the adverse party by surprise, if not pleaded, or which would raise issues of fact not appearing on the face of a prior pleading *must* be raised as an "Affirmative Defense."

Spatz Furniture v. *Lee Letter Service*, 52 Misc. 2nd 291, 294 (N. Y.); *Gunther* v. *Village of Larchmont*, 30 A. D. 2nd 303, 305 (N. Y.); *Parmellie* v. *Lawrence*, 78 U. S. 11 Wall. 38, 20, 49; *Shelley* v. *Kraemer Mich. & Mo.*, 1948, 68 S. Ct. 836, 334 U. S. 31, 92 L. Ed. 1161, 3 ALR 441.

That in the case of *Puget Sound Power, etc.* v. *King County* (Wash. 1924, 445 Ct. 261, 264 U. S. 22, 68 L. Ed. 541, this Court held in 68 L. Ed. 545, that

> "Whatever the effect of the distinction in the procedure of the State, which counsel seek to make, we are in no doubt that that which the Washington Statute calls the judgment is the Judgment referred to in the Act of Congress of September 6, 1916, supra, fixing the time in which writs of error must be applied for and allowed. The motion to dismiss the writ granted the Power Company must be denied.
>
> A separate motion to dismiss is directed against the City of Seattle which appears as plaintiff in error with the street railway company. It was made a defendant in the Superior Court by the company. It filed an answer supporting the averments of the Complaint and a cross complaint against its co-defendants, asking the same relief as that asked in the complaints. It took a separate appeal to the Supreme Court of the state. *No evidence appears in the record that it raised an objection based on the 14th Amendment to the Federal Constitution or any other Federal question* in the *Superior* Court or the *Supreme* Court.
>
> It is too late for the city to raise it in the assignments of errors, *with* the street railway company, which did raise the question in all the Courts. Sully v. American National Bank, 178 U. S. 289, 297, 44 L. Ed. 1072, 1075; 20 Sup. Ct. Rep. 935. It is difficult to see how, under Trenton v. New Jersey, 262, U. S. 182, 67 L. Ed. 937, 29 ALR 1471, 43 Sup. Ct. Rep. 534 and like cases, the city could have been heard, as against the state to complain

of state taxes on the ground that they violated the 14th Amendment, but it is not necessary to decide this. The motion to dismiss the writ of the City *must* be *granted* for the reason first stated."

In the case of *Edelman* v. *State of California, supra, Edelman* v. *State of Cal. Col.* 1953, 73 S. Ct. 293, 344 U. S. 357, 97 L. Ed. 387, in 97 L. Ed. 387 on page 391, the Court stated:

> "It is clear that this Court is without power to decide whether Constitutional rights have been violated when the Federal Questions are not seasonably raised in accordance with requirements of State Law."

Hulbert v. *Chicago,* 202 U. S. 275: 50 L. Ed. 1026, 265 ct. 617 (1906); *Mutual Life Ins. Co.* v. *McGrew,* 188 U. S. 291, 308, 47 L. Ed., 480, 484, 233 ct. 375, 63 LRA (1903). Non compliance with such local law can thus be an adequate state ground for a decision below.

It follows that the question whether the vagrancy statute is invalid under the 14th Amendment is not properly before us.

That from the foregoing it appears that the appellants in the "County Appeal" No. 220 not having raised any "Federal Questions" in their pleadings in the State Courts, they cannot now be permitted to raise any "Federal Questions" for the first time on their appeal to this Court (Case #220) from the aforesaid judgment of the Court of Appeals of the State of New York.

POINT IV

The failure of the appellant (Pact Realty Corp.) in the (Pact Appeal No. 221) to properly plead as an "Affirmative Defense" in its answer to the amended complaint of the plaintiffs in the State Court of the State of New York, sufficient ultimate facts to show the actual "Federal or Constitutional" questions, sought to be reviewed by this Court, said "Affirmative defense as pleaded is insufficient as a Matter of Law".

This action as previously stated is based upon the fact that the Courts of the State of New York including the Court of Appeals have determined as a Matter of Law that section 71 of the Suffolk County Tax Act, a part of Chapter 152 of the Laws of the State of New York (1929), is a valid tax statute of said state.

The courts of said state including the Court of Appeals have also decided as a Matter of Law, that the Taxing Authorities of the County of Suffolk of said State and also in this case, "Of the Town of Babylon of the State of New York" have failed to strictly comply with the mandatory and jurisdictional requirements of Section 74 S.C.T.A., which resulted in the cancellation of the tax sale and tax deed of the tax sale purchaser.

That the appellant Pact in its answer (RA59-A60) merely alleges "1. Any nullification of the deed of the defendant Pact Realty Corp., upon the grounds alleged in the complaint would deprive the defendant Pact Realty Corp. of its constitutional rights under

(a) Article I, Section 10 of the United States Constitution;

(b) Amendment V of the United States Constitution;

(c) Article I, Section 6 of the New York State Constitution;

(d) Article III, Section 1 of the New York State Constitution.

A reading of the above 'Affirmative Defense', as pleaded clearly shows that said 'Affirmative Defense' as pleaded are mere Conclusions of Law."

Article I, Section 10 of the United States Constituttion contains (3) paragraphs containing many constitutional rights and said defense as pleaded does not show which of the many Federal constitutional rights therein may have been violated, and in addition no ultimate facts are set forth or pleaded in said answer to show how and in what manner, the Judgment of the Court of Appeals of the State of New York entered on March 5th, 1970 has deprived it of its constitutional rights.

The Fifth Amendment of the Constitution of the United States also contains many constitutional rights, and as heretofore set with, said part of said affirmative defense as pleaded for the same reason is also insufficient as a "Matter of Law".

The appellant Pact in its Jurisdictional statement herein page 8 (hereafter referred to as Pact J. S.) relies heavily upon (3) cases *Wood* v. *Lovett,* 313 U. S. 362, 369, *supra, Clarke v. Mayor of New York City,* III N. Y. 621, 623-624 and *Post* v. *Cowan,* 236 A. D. (N. Y.) 26, set forth in the main brief submitted in the Court of Appeals as authority for its claim that its constitutional rights have been violated but the appellant Pact has neither in any of its pleadings in the Courts of the State of New York, nor in the affirmation of Moses Krivis in support of its motion for summary judgment (RA24) set forth or pleaded any ultimate facts which would conclusively show how and in what manner the affirmative defense as pleaded in its answer (RA59-60) to the amended complaint is sufficient as a "Matter of Law" to properly raise in the State Courts

"Federal Questions", which question could or should have been passed upon by the Court of Appeals of the State of New York.

That the appellant Pact Realty Corp. in the "Pact Appeal" has also set forth as above noted that any nullification of the deed, etc., would deprive it of its constitutional rights under Article I, Section 6 and Article III, Section 1, of the New York State Constitution.

This Court "is without authority to review and revise the construction affixed to a state statute as to a state matter as construed by the Court of Last Resort of the State". *Quong Hom Wah Co.* v. *Industrial Commission*, Cal., 1921 41 S. Ct. 373; 255 U. S. 445, 448, 65 L. Ed. 723 and cases cited. *Terrace* v. *Thompson*, Wash. 1923, 44 S. Ct. 15, 263 U. S. 197, 68 L. Ed. 255.

The question whether or not a state statute conflicts with the constitution of the state is settled by the decision of its highest court. *Carstairs* v. *Cochran*, MD 1904, 24 S. Ct. 318, 193 U. S. 10, 48 L. Ed.

That from the foregoing it appears that the "Affirmative Defense" as pleaded in the "Fourth Affirmative Defense", in "Pact's" answer to the amended complaint contains only "Conclusions of Law" as to "Federal Questions" and as a result of said "Affirmative Defense" is insufficient as a "Matter of Law" to raise any "Federal Questions". See cases under Point III.*

POINT V

The doctrine of "Wood v. Lovett," *supra*, does not apply to the facts in the cases on appeal to this Court.

The Appellees "Rogers" have no quarrel with the holding in the case of *Wood* v. *Lovett, supra*, which holds that

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* *MacIveré* v. *George Brazzilleo, Inc.* (N. Y.) 32 Misc. 2nd Series 477, 478;
Guffo v. *Taurielli* (N. Y.) 23 Misc. 2nd, 430, 433;
Morganstern v. *Cohon*, 2 N. Y. 2nd, 302, 307;
McGowan v. *McGowan* (N. Y.), 4 Misc. 2nd, 165;
Schiff v. *Schiff*, N. Y. 270 A. D. 845, 846.

a taxing authority can enter into a valid contract to sell real property previously acquired by the State at a tax sale to a purchaser, and that said contract could be impaired by a subsequent legislative enactment of a statute, which repeals the Statute under which the contract was made, but the facts of that case are entirely different from the cases on appeal to this Court.

In the *Lovett* case, *supra*, the State of Arkansas at the time that it contracted to sell the property at tax sale had already acquired the tax title to the real property in question.

In the cases on Appeal to this Court, at the time that the alleged Contract was made on November 16, 1964, the property was first sold at a tax sale on that day and subsequently a Certificate of Sale (not a deed) was executed and delivered by the County Treasurer to Pact Realty, the Tax Sale purchaser, both appellants herein.

In the *Lovett* case, *supra*, the contract was consummated by the execution and delivery, by a quit claim deed to the purchase pursuant to a 1935 Act of the Arkansas Legislature, which said Legislative Act was totally repealed by a 1937 Act of the said Arkansas Legislature and as a result the contracts therein was impaired within the meaning of the Constitution by a subsequent Legislative Act.

In the case before this Court it is *admitted* by the appellants in the "County Appeal" (County J. S. Par. 1 Page 8) that no Legislative Act, impaired the obligation of the alleged contract herein, but that "The Court of Appeals decisions, had made mandatory, that which the Legislature said was directory and by so doing has made Secs. 70 and 71 of the Suffolk County Tax Act repugnant to the United States Constitution Art I, Sec. 10 and Amendment V".

The fact however in the case before this Court on November 16th, 1964 an alleged contract was entered into, however by its terms, in order to complete the contract so that a valid tax deed could be executed and delivered by the taxing authorities (pursuant to the Statutes then in force, includ-

ing Sec. 71 of SCTA) it became necessary for said taxing authorities to strictly comply with the mandatory provisions of Sections 71, 52, 70 and 75 of the Suffolk County tax Act and any failure of said taxing authorities to perform the duties imposed on the taxing authorities by the mandatory and jurisdictional requirements of any of said "Statutes" resulted in a nullification of the terms of said entire contract, and any alleged tax deed given to a tax sale purchaser by the County Treasurer of the County of Suffolk.

Since the obligation which the Constitution of the United States protects from impairment are such as exist, by reason of the contract, it follows that as a basis for invoking the rule, *there must be a valid contract*, possessing the essential element of consent. Furthermore the impairment of a contract cannot exist, where the alleged contract is based upon a proviso contained in a void statute.

It is for the reason set forth above that the appellants in both of the appeals herein take the *unique* position that although Sections 70 and 71 of the Suffolk Tax Act are not *void*, nevertheless, "the decision of the New York Court of Appeals erroneously applies law to a statute so that it results in the *unconstitutional impairment of a contract*, and, by cancelling a recorded deed, deprives a party of property without due process of law under the federal constitution" (County J. S. pp. 9 and 10).

The appellant "Pact" in other words takes the same position in (Pact J. S. p. 8).

That at this point, the facts in the appeals before this court, make it necessary to determine:

> "If a Judicial Decision of the highest Court of the State of New York construing a valid 'Statute of the State' invalidates the obligation of a contract made pursuant to said valid statute as said impairment of the obligation is defined in Article I Section 10 of the Constitution."

The answer to this question is to be found in the cases of *Fleming* v. *Fleming,* decided February 8th, 1924, Iowa, 44 S. Ct. 246, 264 U. S. 29, 68 L. Ed. 547, decided February 8, 1924.

Mr. Justice Taft delivered the opinion of the Court, and in 68 L. Ed. 547, at page 549, he stated:

> "In Tidal Oil Co. v. Flanagan decided January 7, 1924 (263 U. S. 444, anti 382 44 S. Ct. Rep. 197) we had occasion to consider the same issue. After a somewhat full examination we held that, by a score of decisions of the court, a *judicial* impairment of a contract obligation *was not within* § 10 Article 1, of the Constiution, since the inhibition was directed *only against impairment* by legislation, and that such judicial action presented no Federal question of which this court could take jurisdiction on a writ of error from a State Court." (Emphasis supplied.)

In other words, the contention is that the same statute was one law when first construed before the making of the contract, and has become a new and different act of the legislature by the later decision of the Court. *This is ingeneous* but unsound. It is the same law. The effect of the subsequent decisions is not to make a *new law*, but only to hold that the law *always meant* what the Court now says it means. The Court has power to construe a legislative act, but *it has no power,* by a change in construction, *to date* its passage, as a law from the time of the later decision. A *statute* in force at the time a contract was made *cannot* be *made* a subsequent statute through *new interpretation by the Courts.* (Emphasis supplied.)

In the *Flanagan* case, *supra,* Mr. Chief Justice Taft also delivered the opinion and in 68 L. Ed. 385 and 386, he stated "It has been settled by a long line of decisions, that the provision of § 10 Article I of the Federal Constitution

protecting the obligation of contracts against state action is directed only against impairment by legislation and not by judgment of the Courts. The language No state shall . . . pass any law impairing the obligation of contracts—plainly requires such a conclusion." However the fact that it has been necessary for this court to decide the question so many times is evidence of the persistent error in regard to it.*

POINT VI

No Federal Question was passed upon in this case by the Court of Appeals of the State of New York, for the reason that the Judgment herein rests on an adequate non-federal basis.

The record in this case (appellants' Joint Appendix), stipulated as the whole record to be considered by the Court of Appeals (A147) and the Order for Judgment on the Remittitur and the Judgment on Remittitur filed in the Office of the Clerk of the County of Suffolk on April 15, 1970 and filed in this Court on June 3, 1970, shows that this is an action to determine claims to the real property which is the subject of this action, located in the County of Suffolk and the State of New York.

The record further shows this action was brought by the plaintiff William Rogers, and Rose Rogers, his wife, appellees on this appeal, against the appellants herein and The Town of Babylon, of the State of New York, which has not participated on this appeal.

The law involved in said action is Chapter 152 of the Laws of 1929 (New York) also known as The Suffolk County Tax Act.

The section of said Tax Act directly involved and the Statute on which said action is based is Section 71 of the Suffolk County Tax Act.

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* *Lathrop* v. *Donohue*, 367 U. S. 820, 6 L. Ed. 2 1191, 1195, 81 S. Ct. 1826.

That the record also shows that the Decision of Mr. Justice Geiler of the Supreme Court of Suffolk Co. (RA 131-A145). The corrected decision (A146), the Judgment entered thereon and filed in the Office of the Clerk of the County of Suffolk (RA A 11-A17) on the Decision of the Appellate Division of the Supreme Court (RA 154), officially reported in 32 A. D. 2d 929, the Order entered thereon (RA 152-A153) and the Decision of the Court of Appeals (26 N. Y. 2d 872), and the judgment entered thereon clearly shows that none of the Courts of the State of New York, in this case either passed upon or considered any "Federal Questions Raised" for the reason that said Orders and Judgments rested solely on adequate non-federal grounds.

That in the case of *Black* v. *Cutler Laboratories,* Cal. 1956, 76 S. Ct. 824, 351 U. S. 292, 100 L. Ed. 1188, rehearing denied 77 S. Ct. 352 U. S. 859, 1 L. Ed. 2d 69, Mr. Justice Clark delivered the opinion of the Court in 100 L. Ed. 1188, 1197, the court stated:

> "We believe the Supreme Court of California construed the term 'just cause' to embrace membership in the Communist Party, and refused to apply the doctrine of waiver. As such the decision involves only California Construction of a *local contract under local law* and no substantial federal question is presented. Moreover, even if the State Court's opinion is to be considered ambiguous, we should choose the interpretation which does not face us with a constitutional question. See Stembridge v. Georgia, 343 U. S. 541, 547, 96 L. Ed. 1130, 1133, 72 S. Ct. 834, Point I, supra, and cases cited, Cf. United States v. Rumely, 345 U. S. 41, 97 L. Ed. 770, 73 S. Ct. 543. It follows that the writ must be dismissed."

POINT VII

Special Term's construction of Sec. 71 SCTA does not create an additional notice to redeem or create an additional notice of the tax sale, nor does said construction create legislation by judicial decree, forbidden under Article III, Sec. 1 of the New York State Constitution.

Appellant, Pact Realty Corp. contends that special term's construction of Sec. 71 SCTA would create an additional notice to redeem from the tax sale or as an additional notice of the tax sale is legislation created by judicial decree, forbidden under Article III, Sec. 1 of the N. Y. State Constitution. This contention is not based on the facts in this case. The 1963/1964 tax bill and the 1964/1965 tax bill admittedly do not conform to the exact provisions of Sec. 71 of the SCTA. Is the failure to follow Sec. 71 SCTA fatal to the tax sale?

These questions were clearly answered by Justice Glickman of this Court in the case of *Stebila* v. *Mitrany*, N.Y.L.J., December 24, 1965, p. 10, col. 5, affirmed by the Court of Appeals, 21 N. Y. 2d 930, in the following language:

> "The Court is satisfied from the facts disclosed in the papers that plaintiffs were afforded adequate notice and opportunity to make timely payments of the arrears and thus avoid the issuance by the County Treasurer of the deed which is the subject of this action. However, sympathetic as the Court is to the contentions of defendant, it is constrained to hold that the failure to note 'arrears' on the tax bill of 1958-1959 is sufficient in law to invalidate the tax sale and tax deed. In reaching this conclusion, the Court is guided by decisional law contained in the

case of Ierna v. Maranzano, 211 N.Y.S. 2d 616; Erlwein v. Patchogue Homes Corp., 43 Misc. 2d 707, 252 N.Y.S. 2d 220 and Proschieck v. Erlwein, N.Y.L.J., 7/31/64, p. 8, col. 5, Aff'd 22 A. D. 2d 1018, leave to appeal denied, 15 N. Y. 2d 486. In the last mentioned case, Justice Munder of this Court, in granting summary judgment declaring invalid a tax sale and deed for omission of the word 'Arrears' on a subsequent tax bill, held that the provisions of Sections 70 and 71 of the Suffolk County Tax Act are mandatory and require strict compliance.''

Unless Sec. 71 of SCTA is complied with in all its provisions and requirements any tax sale pursuant thereto would be invalid and void, even though acts were to be performed after the tax sale.

Special term in holding that the *1963/64* tax bill was void (RA 137) for two reasons dealing with the format of the Bill: (1) In that it failed to provide therein ''A ruled column for Arrears'' as required by 71 SCTA and (2) It had printed on the bottom of the reverse side of the tax bill, the legend called ''County Treasurer's Notice'', instead of having it printed on the bottom of the front (RA 137) of said tax bill, was completely within its authority to construe and interpret. Sec. 71 SCTA must be construed in its strictest terms in favor of the taxpayer and nothing in Sec. 71 SCTA can be construed as superfluous, and possible harm did result to the plaintiffs-respondents, by reason of the omission of ruled column, as required by the terms of Sec. 71 SCTA, otherwise this procedure would not be before this Court.

POINT VIII

The case of *I. Jack London* v. *Richard Hammel*, New York Court of Appeals 6/15/1970.

Subsequent to the decision and judgment of the Court of Appeals of the State of New York, appealed from by both the appellants in the "County Appeal" and the "Pact Appeal" entered March 5, 1970, herein and also subsequent to the filing of these appeals in this court (June 3, 1970) the said Court of Appeals of the State of New York rendered a decision on June 15th, 1970 in the Case of *I. Jack London* v. *Richard Hammel.*

In said case, the published notice to redeem from the tax sale given by the County Treasurer of Suffolk County one of the appellants herein pursuant to Sec. 52 SCTA did not state "the amount necessary to redeem the same computed to the last day in which such redemption can be made".

The appellants in the appeals in this case "County" and "Pact" both take this position that the tax sale of 11/16/1964 was subject only to the right of redemption by the fee owner, and by their failure to redeem after having been served with "Notice to Redeem" in the form of a redemption notice as specifically prescribed by Sec. 52 SCTA, that the right to redeem ceased and that as a result the alleged contracts, heretofore referred to, entered into on 11/16/64 became a valid and binding contract.

The Memorandum decision of the Court of Appeals in the *London* case, *supra,* has not up to this time been officially reported. A certified copy of the official decision has been ordered from the Court of Appeals, but has not been received. The unofficial decision (Memorandum) follows:

"MEMORANDUM:

The order of the Appellate Division should be reversed and the case remitted to Supreme Court, Suffolk County, for the entry of judgment in favor of plaintiff-appellant London on his first cause of action.

Section 52(1) of the Suffolk County Tax Act (added by L. 1929, ch. 152, and L. 1958, ch. 960 § 29) requires, before expiration of the period for redemption of land sold at tax sales, publication of a notice of unredeemed real estate, containing, as provided in section 1014(1) of the Real Property Tax Law, 'the amount necessary to redeem the same computed to the last day in which such redemption can be made'. Section 75 of the S.C.T.A., authorizing a tax sale purchaser to pay taxes on the property not paid by the owner of record, requires that these taxes, plus interest and penalties, be paid by the owner of record at the time of redemption (see, also, Real Property Tax Law, § 1010[1][a]). The failure of the County Treasurer to include this additional sum in the published notice, when the payment of taxes by the purchaser was already known to him at the time of publication, is a substantial deviation from the mandate of the statute. The statutory provision, for the benefit of the owner, should be strictly construed in his favor, even if he may have eventually received notice of the correct amount by methods other than required by the statute. The tax deed is therefore void, and the owner should be permitted to redeem the property. (Cf. *Rogers* v. *Pact Realty Corp.*, 26 N. Y. 2d 872; *Stebila* v. *Mitrany*, 21 N. Y. 2d 930; *Clason* v. *Baldwin*, 152 N. Y. 204, 209-211.)

* * * * *

Order reversed, without costs, and the case remitted to Supreme Court, Suffolk County, for further proceedings in accordance with the memorandum herein. All concur."

That upon receipt of the certified copy of the foregoing decision from the Court of Appeals the original will be

filed with this court and copies furnished to the appellants. That Pact in its jurisdictional statement Page 13 Par. 1 states:

> "A valid tax sale cannot be wiped out, except by *proper* redemption."

At page 12 (pp. 3 and 4) Pact states:

> "to anticipate appellees presentation of their argument that they were deprived of their property without due process when their property was sold for non-payment of the 1963/1964 taxes * * *.
>
> The answer is contained in Sec. 52 SCTA which spells out, how, when, and who is to serve appellees with a notice to redeem from the tax sale-who-the 'County Treasurer' when—'at least three months before the thirty-six months allowed for the redemption of the real estate sold, how—under the terms *prescribed by the real property tax law,* which is by newspaper publication of a fixed frequency'."

That pursuant to the provisions of Section 75 SCTA the tax sale purchaser "Pact" herein paid to the County Treasurer of the County of Suffolk taxes due on the subject property herein for 1965/1966, 1966/1967 and redeemed tax sale Cert. #154 of Joseph Harris (RA 25) prior to the time it received the tax deed herein.

That it has often been said that where an invalid or improper notice has been served or given, allegedly pursuant to a statute, said notice is no more effective "to extinguish vested rights" than if not notice of any kind were given.

This is especially true, if the notice required to be given, as in this case, is both mandatory and jurisdictional. A proper *redemption* must be *based* upon a *valid notice to redeem,* and by reason of the failure of the "County Treasurer of Suffolk County" one of the *appellants* in this

case is to give a "proper and valid notice to redeem" pursuant to Section 52 of Suffolk County Tax Act, the tax sale and tax deed are void for the reason that section 52 SCTA was not complied with, by the "appellant", the County Treasurer of Suffolk County in that he did not cause to be published a valid and proper notice to redeem in the form as mandated by the provisions of Section 52, SCTA.

POINT IX

Any disasterous results of Special Term's decision is not the fault of the plaintiffs-respondents, but is the fault of the taxing authorities of the Town of Babylon and the County of Suffolk.

The legislature has the authority to pass our laws and when it enacted Section 71 SCTA it was fully mindful of the fact that on *all* tax bills of any real property in said County there *must appear* on the *front* or face of said bills all of the mandatory provisions of said Section 71 SCTA from which the owner or owners could determine *at a glance* at said tax bill if there were *any tax arrears,* on said real property or if the same had been *sold* for *unpaid* taxes and were *still redeemable* and the *title of the county official* from whom the property owner could obtain such vital information.

That as a result in *order to protect* and give to the fee owner of all property in the County of Suffolk actual notice of the taxable status of said real property, the Legislature *mandated* when it enacted Section 71 of SCTA the actual "*Format*" of every tax bill of the respective Towns of the County of Suffolk as to *arrears* or *tax sales* so that the fee owners would be protected against an illegal tax sale of their real property.

That as a result said Section 71 mandates

(1) There must be a ruled column for arrears on every tax bill.

(2) That said column for arrears *must* be opposite the description of the parcel assessed.

(3) That if there are any arrears that may be due, or tax sales that are still redeemable there shall be written in said column the word "*Arrears.*"

That in addition the Legislature was also fully mindful of the fact that the only tax official of the County of Suffolk which has tax records which show the actual taxable status of all real property located in the various towns of the County of Suffolk is the County Treasurer himself.

That as a result, said Section 71 further provides:

> "and at the *bottom* of said bill shall be *printed:* Whenever any tax or assessment shall remain unpaid for six months from February First, the property will be sold to satisfy such arrears of taxes or assessments, and all taxes and assessments up to a day to be named in the advertisement of sale. The amount of arrears may be obtained from and paid to the county treasurer."

That it is believed that this Court will take judicial notice of the fact as did the New York Court of Appeals, that the Suffolk County Tax Act mandates the tax description of all real property in the various Towns of the County of Suffolk, must appear on the *front* or *face* of said tax bills, and that on all of the tax bills of the various Towns of the County of Suffolk there must also appear on the front or face of said bills:

(1) The name and address of the assessed owner.

(2) The Acreage, School District in which the premises are located.

(3) The code, assessed valuation, the amount of tax due.

(4) When taxes are due and payable.

(5) All other mandatory notices.

The only question presented in this case is did the taxing authorities comply with the provisions of Sec. 71 SCTA? Justice William R. Geiler, in his memorandum (A137) states,

> "The Legislature had an opportunity to expressly change or modify Section 71 SCTA. They chose not to do so . . . This Court will not change Section 71 SCTA by implication in view of the fact that the Legislature, if it intended to change Section 71 SCTA, refused to expressly modify or change the mandatory requirements of said section."

Furthermore, an examination of Sections 70 and 71 of the SCTA indicates that they accomplish two different and distinct purposes and neither section is repugnant to the other. The responsibility for the strict compliance with said sections lies with two different taxing authorities, namely the County and the Town respectively.

Section 391, McKinney's Statutes provides at page 412:

> "It is only where there is an irreconcilable conflict between the acts or where the subsequent act is clearly intended to supersede the former statute that a repeal by implication arise. To avoid a repeal by implication courts will narrowly construe a statute to keep it from conflicting with another, and when by fair construction some office or function can be assigned to both acts, or they confer different powers for different purposes both must stand, though they were designed to operate on the same general subject."

The fact that, if the contentions of the appellees Rogers are upheld, a great deal of confusion will follow, is not the question involved in this case. The only question involved in this is, "Did the taxing authorities comply with the provisions of Sec. 71 SCTA, so as to deprive the appellees Rogers of their real property, without the mandated notice as required by said Section 71 SCTA? Any disasterous

results of this ruling is not the fault of the appellees "Rogers" but is the fault of the taxing authorities of the Town of Babylon and appellants in the County Appeals" herein.

Conclusion

For the reasons given above (1) the Appeal of Chester F. Jacobs as County Treasurer of Suffolk County, and the County of Suffolk of the State of New York (appellants in the County Appeal No. 220 October Term, 1970, and (2) the Appeal of the Pact Realty Corp. (the appellant in the Pact Appeal No. 221 October Term, 1970) from the Judgment (Order and Remittitur) of the Court of Appeals of the State of New York, entered March 5, 1970, on direct appeal to this court pursuant to Title 28 U.S.C.A., 1257 (2) on the grounds that said judgment construing Sec. 71 of Chapter 152 of Laws of 1929 (N. Y.) and construing Section 70 as amended by Chapter 745 of Laws of 1959 N. Y. in this case, to the prejudice of both of said "appellants" in a manner repugnant to the United States Constitution should be dismissed because of the fact that this Court lacks jurisdiction to review the aforesaid Judgment of the Court of Appeals of the State of New York.

In the alternative, the aforesaid judgment should be affirmed, because the questions asserted are so insubstantial as not to warrant further judicial review.

Respectfully submitted,

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WILLIAM M. JOHNSON, Esq. and
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on the Brief.

APPENDIX A

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES

ARTICLE I, Sec. 10. Restrictions upon powers of states (first paragraph)

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts or grant any Title of Nobility.

AMENDMENT (V) Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

> No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE STATE OF NEW YORK

ARTICLE I, Sec. 6 (last paragraph)

> No person shall be deprived of life, liberty or property without due process of law.

Appendix A.

SUFFOLK COUNTY TAX ACT

Section 53.

Sec. 53. Conveyance of Property Not Redeemed. If such real estate, or a part thereof, be not redeemed as herein provided the county treasurer shall execute to the purchaser, including the county, its or his heirs, successors, or assigns, upon the performance by such purchaser of the conditions herein provided, and upon surrender of said certificate of sale or upon delivery of a release of such real estate to the grantee as herein provided and upon the purchaser's taking and paying for an assignment of all outstanding prior tax liens held by the county upon the premises, including all unpaid taxes appearing in the book or books which the county treasurer is authorized and empowered to compile and maintain pursuant to the provisions of chapter one hundred five of the laws of nineteen hundred twenty, and upon the filing of proof of service of notice upon owners and other interested persons as herein and in the general tax law provided, a conveyance of real estate so sold, which conveyance shall vest in the grantees an absolute estate in fee. The county treasurer shall be entitled to demand and receive from such grantee, for the use of the county, the sum of five dollars for preparing such conveyance. Every such conveyance shall be attested by the county treasurer and the seal of the county treasurer attached thereto, and when so executed shall be presumptive evidence that the sale was regular, and also presumptive evidence that all proceedings prior to the sale, including the assessment of the lands sold, and all notices required by law to be given previous to the expiration of the time allowed by law for the redemption thereof, were regular and according to law. After three years from the date of record of any conveyance in the Suffolk County

clerk's office, such presumption shall be conclusive. Every certificate of sale or conveyance executed in pursuance of this act may be recorded in the same manner and with like effect as a deed acknowledged or proved before any officer authorized by law to take proof and acknowledgment of deeds. Two or more lots or parcels of real estate sold to the same person may be included in the same tax deed. (Added by Chapter 152, Laws of 1929, in effect March 28, 1929; amended by Chapter 140, Laws of 1941, in effect March 20, 1941; amended by Chapter 552, Laws of 1953, in effect April 6, 1953; amended by Chapter 26, Laws of 1967, in effect February 28, 1967.)

§ 70. County treasurer to furnish supervisors with list of arrears. The county treasurer shall make a complete list of all taxes and assessments in arrears and shall file with each town supervisor, on or before the first day of September of each year, a list of all arrears of taxes and assessments on property in such town. All sales of property for nonpayment of taxes or assessments shall be considered arrears and be included in such list until the deed has been given as herein provided or until the property is foreclosed and notice hereof is received by the county treasurer as provided in section sixty-two thereof. The supervisor of each town shall thereupon place in a column provided therefor the word "arrears" after the description of each parcel of land as shown on the above mentioned list. (Added by Chapter 152 Laws of 1929, in effect March 18, 1929)

§ 71. Bill of Taxes to Show Arrears. There shall be a ruled column for arrears in every tax bill rendered for taxes for lots on which said arrears or assessments may be due, or may have been sold and are still redeemable, in which shall be written opposite the entry of the description of said lot or parcel of land "Arrears" and at the bottom of said bill shall be printed "Whenever any tax or

assessment shall remain unpaid for six months from February first, the property will be sold to satisfy such arrears of taxes or assessments, and all taxes and assessments up to a day to be named in the advertisement of sale. The amount of arrears may be obtained from and paid to the county treasurer." (Added by Chapter 152, Laws of 1929, in effect March 18, 1929.)

§ 70. *County Treasurer to Furnish Supervisors with List of Arrears.* Following each tax sale the county treasurer shall make and shall file with each town supervisor, on or before the first day of September of each year, a list of all property sold for unpaid taxes and assessments in such town remaining unredeemed. All sales of property for non-payment of taxes or assessments shall be considered arrears and be included in such list until the deed has been given as herein provided or until the property is foreclosed and notice hereof is received by the county treasurer as provided in section sixty-two thereof. The supervisor of each town shall thereupon place in a column provided therefor the word "arrears" after the description of each parcel of land as shown on the above mentioned list. (Added by Chapter 152, Laws of 1929, in effect March 18, 1929; amended by Chapter 745, Laws of 1959, in effect April 23, 1959)

§ 52. *Notice of Unredeemed Real Estate: Notice to Redeem.* 1. Notice of unredeemed real estate shall be given and published by the county treasurer at least three months before the expiration of the thirty-six months allowed for the redemption of real estate sold by him for taxes and assessments, the last publication to be at least six weeks before the expiration of such thirty-six months, and in all other respects shall be as provided in the real property tax law.

2. Whenever by any provision of the real property tax law it is provided that any notice may or shall be given or

filed within a period measured by reference to the time allowed for the redemption of real estate sold for taxes and assessments or by reference to the time of the sale, such provisions shall be construed as referring to the thirty-six month period for redemption herein provided as respects such sales in Suffolk county. Notices required to be served upon occupants of real estate or other pursuant to the real property tax law in relation to the redemption of such real estate from tax sales shall state that such real estate may be redeemed upon the payment of the moneys specified by law to be paid upon the redemption of such real estate.

3. Notice shall be given by the purchaser of any real estate sold for taxes under the provisions of this act in the manner and under the terms prescribed by the real property tax law and notice to redeem from any such sale and notice to occupants shall be made and given as provided by such law. The provisions of the real property tax law relating to redemption shall continue to apply to the matters covered thereby, except as herein otherwise provided, and except that the rate of interest to be paid upon any redemption shall be at the rates fixed by this act. (Added by Chapter 152, Laws of 1929, in effect March 18, 1929; amended by Chapter 960, Laws of 1958, in effect October 1, 1959.)

REAL PROPERTY TAX LAW

§ 1010. Redemption

1. The owner, occupant or any other person may redeem any real property sold for taxes at any time within one year from the last day of sale by paying to the county treasurer, for the use of the purchaser or those claiming under him, the sum mentioned in the certificate of sale with interest thereon at the rate of ten per centum per

annum computed from the date of such certificate. In addition there shall be paid (a) the amount of any tax, special ad valorem levy or special assessment, including penalties and interest thereon prescribed by law, on such real property which the purchaser has paid after the sale and prior to the date of redemption with interest thereon at the rate of ten per centum per annum from the date of payment provided the county treasurer has been notified immediately upon such payment and (b) such amounts as may have been paid by the purchaser to redeem such property from prior or subsequent tax sales with interest thereon at the rate of six per centum per annum from the date of payment.

§ 1014. Notice of unredeemed lands

1. The county treasurer shall, at least three months before the expiration of the one year allowed for the redemption of lands sold by him for taxes, cause commencement of publication of a notice once a week for six successive weeks in the newspapers designated by the board of supervisors of the county for the publication of concurrent resolutions, such notice to contain a list of the lands in the county sold for taxes and unredeemed, specifying particularly every parcel unredeemed, the amount necessary to redeem the same computed to the last day in which such redemption can be made and stating that unless such lands are redeemed on or before such day they will be conveyed to the purchaser.

SECTION 32 (SUFFOLK COUNTY TAX ACT)

SEC. 32. APPLICATION OF TAX LAW. The tax law shall apply and govern in all matters relating to taxation in Suffolk County not inconsistent with the provision of this act. (Chapter 311, Laws of 1920, in effect April 22, 1920.)

Appendix A.

Section 75 (Suffolk County Tax Act)

Sec. 75. Payment of Taxes By Purchaser: Penalties Thereon. The owner or holder of a certificate of sale of lots or parcels of real estate purchased at the tax sale, provided for herein may at any time after annual return of taxes and assessments to the county treasurer by the receiver of taxes, pay to the county treasurer any such and older taxes or assessments as are a lien on such property, and the holder of such certificate making such payment of said taxes shall be entitled to and shall receive the full amount of the taxes thus paid with interest and penalties thereon from the date of payment at the same rate prescribed in section forty-five hereof, provided such purchaser shall have notified the county treasurer thereof immediately upon the payment of any such tax. Such taxes with the same interest and penalties thereon from the date of such payment as herein provided shall become a lien on said property and payable at the time of the redemption thereof, or out of the proceeds realized at the sale of said property under the foreclosure of the certificate of sale as provided in this act. (Added by Chapter 152, Laws of 1929, in effect March 18, 1929.)

28 United States Code, Section 1257 (2)

Final judgment or decree rendered by the highest court of a State, in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By Appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United

States, and the decision is in favor of its validity.

3018 (B) of Civil Practice Law and Rules of the State of New York.

(b) Affirmative Defenses. A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as arbitration and award, collateral estoppel, discharge in bankruptcy, facts showing illegality either by statute or common law, fraud, infancy or other disability of the party defending, payment, release, res judicata, statute of frauds, or statute of limitation. The application of this subdivision shall not be confined to the instances enumerated.

APPENDIX B

Judgment of the Court of Appeals of the State of New York, Dated March 5, 1970

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 5th day of March in the year of our Lord one thousand nine hundred and seventy, before the Judges of said Court.

WITNESS, The HON. STANLEY H. FULD,
Chief Judge, *Presiding*
RAYMOND J. CANNON, *Clerk.*

Remittitur March 5, 1970.

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2. No. 400 69

William Rogers & ano., &c.,
Respondents,

vs.

Pact Realty Corp., & ors., &c.,
Appellants.

Be it Remembered, That on the 4th day of September in the year of our Lord one thousand nine hundred and sixty-nine, Pact Realty Corp. & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Moses

Krivis, & ors., their attorneys, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And William Rogers & ano., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Elwood D. Hooper, their attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Moses Krivis, of counsel for the appellant Pact Realty, and by Mr. Stanley S. Corwin, of counsel for the appellants Jacobs and County, submitted by the appellant Town; and argued by

Mr. William M. Johnson, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided,

to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

s/ RAYMOND J. CANNON

Clerk of the Court of Appeals of the State of New York.
Court of Appeals, Clerk's Office,

Albany, March 5, 1970.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ RAYMOND J. CANNON

Clerk.

APPENDIX C

Memorandum Opinion of the Appellate Division, Second Department

WILLIAM ROGERS, et al., Respondents, v. PACT REALTY CORP., et al., Appellants.—Judgment of the Supreme Court, Suffolk County, dated January 23, 1969, modified, on the law, by inserting in the second ordering paragraph, following the word "answers", the words "to the amended complaint"; and by adding a paragraph severing the cross claims of defendant Pact Realty Corporation against the other defendants. As so modified, judgment affirmed, with one bill of $10 costs and disbursements to respondents, jointly against appellants filing separate briefs. In our opinion, the tax sale and the tax deed to defendant Pact Realty Corp., based on default in paying the second half of the 1963-64 taxes, were invalid because of the failure to have the word "Arrears" noted on the 1964-65 tax bill as required by section 71 of the Suffolk County Tax Act. (See *Hutch* v. *Platt*, 32 A D 2d 925.) The instant case does not involve the validity of a tax or assessment and the provisions of section 63 of the Suffolk County Tax Act are therefore inapplicable. We find no grounds for disturbing the Special Term's determination, except as herein modified, in any of defendants' other contentions. The judgment is modified to permit a determination of the cross claims, a question which was not presented to or decided by the Special Term. Christ, Acting P.J., Brennan, Rabin, Munder and Martuscello, JJ., concur.

APPENDIX D

Memorandum Opinion of Mr. Justice William R. Geiler, Justice of the Supreme Court, Suffolk County, State of New York

MEMORANDUM
Motion No. 2748
Ind. No. 164, 335
9/3/68

SUPREME COURT, SUFFOLK COUNTY
SPECIAL TERM PART I

WILLIAM ROGERS and ROSE ROGERS, his wife,

Plaintiffs,

vs.

PACT REALTY CORP., TOWN OF BABYLON OF THE STATE OF NEW YORK, CHESTER F. JACOBS, as County Treasurer of the COUNTY OF SUFFOLK, and the COUNTY OF SUFFOLK,

Defendants.

By GEILER J.S.C.
Dated November 25, 1968

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Appendix D.

Motion by defendant Pact Realty Corp. (hereinafter referred to as Pact) for summary judgment dismissing the complaint and cross motion by plaintiffs for summary judgment.

Plaintiffs instituted this action pursuant to Article 15 of the Real Property Law of the State of New York, to set aside a tax deed executed and delivered by defendant Treasurer of the County of Suffolk (hereinafter referred to as Treasurer) to Pact.

Plaintiffs admittedly failed to pay the second half of the 1963/64 taxes on their property located in the Town of Babylon, County of Suffolk. Pact purchased the subject property at a tax sale on November 16, 1964. The property was not redeemed within the 36 month redemption period and the Treasurer delivered a tax deed to Pact on January 28, 1968. Pact recorded the deed on January 31, 1968.

The parties herein have stipulated to the following facts:

1. The tax bill for 1964/65 and the assessment roll for 1964/65 did not have the word "arrears" stamped thereon.

2. The "County Treasurer's Notice" was not printed on the bottom of the face side of the tax bills from 1963/64 through 1967/68 but was printed on the reverse side of said tax bills.

3. The "County Treasurer's Notice" provides:

> "Whenever any tax or assessment shall remain unpaid for six months from February First, the property will be sold to satisfy such arrears of taxes or assessments, and all taxes and assessments up to a day to be named in the advertisement of sale. The amount of arrears may be obtained from and paid to the County Treasurer."

4. All of the above mentioned tax bills did not have a ruled column for arrears printed thereon.

Plaintiffs contend that the tax sale herein was void because the provisions of Section 71 of the Suffolk County Tax Act (hereinafter referred to as S.C.T.A.) were not strictly complied with by the taxing authorities. They especially argue that Section 71 of the S.C.T.A. required that arrears be noted on the 1964/65 tax bill and that the "County Treasurer's Notice" must be printed on the bottom of the front side of the tax bill.

Pact maintains that the plaintiffs have given an erroneous interpretation to Section 70 of the S.C.T.A. and therefore their contentions are without merit. The tax sale purchaser specifically asserts that the word "arrears" was not required to be noted on the 1964/65 tax bill because of the "operation of Section 70 of the S.C.T.A. as amended in 1959." Pact also argues that the printing of the "County Treasurer's Notice" on the bottom of the reverse side of the tax bill complies with the requirements of Section 71 of the S.C.T.A.

Furthermore, Pact contends that plaintiffs' action is barred by the Statute of Limitations as contained in Section 63 of the S.C.T.A.

Section 71 of the S.C.T.A. provides:

"SEC. 71. BILL OF TAXES TO SHOW ARREARS.

There shall be a ruled column for arrears in every tax bill rendered for taxes for lots on which said arrears or assessments may be due, or may have been sold and are still redeemable, in which shall be written opposite the entry of the description of said lot or parcel of land 'Arrears' and at the bottom of each bill printed 'Whenever any tax or assessment shall remain unpaid for six months from February First, the

property will be sold to satisfy such arrears of taxes or assessments, and all taxes and assessments up to a day to be named in the advertisement of sale. The amount of arrears may be obtained from and paid to the County Treasurer.'"

What was the purpose of the Legislature in enacting Section 71 of the S.C.T.A.? Why did they so minutely describe what must be contained in each tax bill? Why is the tax bill so important?

The tax bill is the only actual or personal notice a property owner receives with reference to the taxable status of his property in Suffolk County. He will receive no other notice of the taxable status of his property unless the property is to be sold for unpaid taxes due thereon. Then the only notice he receives is that of the sale and this notice is not given personally but only by publication as prescribed by Sections 42 and 43 of the S.C.T.A.

The Legislature, cognizant of these facts, wanted to make certain that the property owner was made aware of any possible loss of his property because of unpaid taxes. They wanted this notice to be given in such a manner so as to alert not only the knowledgeable but also the uninformed property owner.

What was the best way to accomplish their purpose? How could they make even the most unsuspecting property owner aware of any tax monies due and owing?

The Legislature came to the conclusion that their purpose could best be achieved by mandating the format of the tax bill which every property owner receives. They therefore determined that the front of all tax bills in Suffolk County should contain certain items from which a property owner, regardless of his knowledgeability of real estate taxes, could determine, at a glance, if there were any tax arrears and the title of the County official from

whom the property owner could obtain such vital information. Hence, Section 71 was enacted and has not been amended to date.

The 1963/64 tax bill admittedly does not conform to the exact provisions of Section 71 of the S.C.T.A. Must there be strict compliance with Section 71? Is the failure to follow Section 71 fatal to a tax sale?

These questions were clearly answered by Justice Glickman of this Court in the case of *Stebila* v. *Mitrany*, N.Y.L.J., December 24, 1965, P. 10, Col. 5, affirmed by the Court of Appeals, 21 N. Y. 2d 930, in the following language:

> "The Court is satisfied from the facts disclosed in the papers that plaintiffs were afforded adequate notice and opportunity to make timely payments of the arrears and thus avoid the issuance by the County Treasurer of the deed which is the subject of this action. However, sympathetic as the Court is to the contentions of defendant, it is constrained to hold that the failure to note 'arrears' on the tax bill of 1958-1959 is sufficient in law to invalidate the tax sale and tax deed. In reaching this conclusion, the Court is guided by decisional law contained in the case of Ierna v. Maranzano, 211 N.Y.S. 2d 616, Erlwein v. Patchogue Homes Corp., 43 Misc. 2d 707, 252 N.Y.S. 2d 220 and Proschieck v. Erlwein, N.Y.L.J. 7/31/64, p. 8, col. 5, Aff'd 22 A. D. 2d 1018, leave to appeal denied 15 N. Y. 2d 486. In the last mentioned case, Justice Munder of this Court, in granting summary judgment declaring invalid a tax sale and deed for omission of the word 'Arrears' on a subsequent tax bill, held that the provisions of Section 70 and 71 of the Suffolk County Tax Act are mandatory and require strict compliance."

Appendix D.

Pact maintains that neither *Stebila, supra,* nor the "arrears" cases cited therein are determinative of the issues herein because these cases were decided prior to the 1959 amendment of Section 70 S.C.T.A. The tax sale purchaser contends that Section 70 of the S.C.T.A., as amended in 1959 controls Section 71 S.C.T.A. and by its operation "arrears" was not required to be noted on the 1964/65 tax bill.

Section 70 of the S.C.T.A. as amended in 1959 reads as follows:

> "§ 70. County treasurer to furnish supervisors with list of arrears. *Following each tax sale the* county treasurer shall make a [complete list of all taxes and assessments in arrears] and shall file with each town supervisor, on or before the first day of September of each year, a list of all [arrears] of *property sold for unpaid* taxes and assessments on property in such town *remaining unredeemed.* All sales of property for non-payment of taxes or assessments shall be considered arrears and be included in such list until the deed has been given as herein provided or until the property is foreclosed and notice hereof is received by the county treasurer as provided in section sixty-two thereof. The supervisor of each town shall thereupon place in a column provided therefor the word 'arrears' after the description of each parcel of land as shown on the above mentioned list."
>
> (NOTE: Changes or additions in text are indicated by *italics*, deletions by brackets).

Pact's position is based on the following syllogism:

1. Plaintiffs' property was sold in November, 1964.

2. The County Treasurer, by virtue of Section 70 S.C.T.A., was not required to file with the Town of

Appendix D.

Babylon a list, showing plaintiffs' property sold for unpaid taxes, until September 1, 1965.

3. Section 70 S.C.T.A. states that "all sales of property for non-payment of such taxes or assessments shall be considered arrears." [Note this provision was also in Section 70 prior to 1959 Amendment].

4. The meaning of arrears is limited to property sold for non-payment of taxes.

5. Arrears did not exist until after the sale of plaintiffs' property.

6. The Town of Babylon did not receive the list of arrears (property sold for unpaid taxes) from the County Treasurer until after the tax bills for the year 1964/65 were sent out in December 1965.

7. Thus, "arrears" was not required to be noted on the 1964/65 tax bill.

Plaintiffs' position is untenable. It is based on a definition of "arrears" which has been refuted by Justice Ritchie of this Court in the case of *Erlwein* v. *Patchogue Homes Corp.*, 252 N.Y.S. 2d 220, at page 223:

> "* * * the interpretation of the word 'Arrears', as included in the Suffolk County Tax Act means only those arrears that have been established by a sale of the property for unpaid taxes.
>
> The Court does not agree with plaintiffs' contention."

What if no one purchased a particular piece of property offered at a tax sale because of non-payment of taxes? Does this mean, because the property is not sold, that

there are no arrears? Doesn't the tax receiver, in the first instance, determine if there are arrears?

Thus it is clear that "arrears" was never intended to be limited to mean property sold for unpaid taxes. The only reasonable definition of "arrears" is its ordinary usage as defined in Black's Law Dictionary, 4th Edition, at page 140: "Money unpaid at due time."

This Court does not agree with Pact's contention that the Legislature modified or changed the mandatory provisions of Section 71 S.C.T.A. by the amendment to Section 70 S.C.T.A.

McKinney's Statutes, Section 73 states at page 110:

> "The Constitution of this State vests the Legislative power in the Senate and Assembly and that the Courts may not divest or usurp that power has been announced so frequently and in such varying language to defy repetition. Thus it is said that courts may not make, change, amend, or repeal a statute, since their function is to interpret, declare and enforce the law, not to make it. No matter what disastrous consequences may result from following the expressed intent of the Legislature the Judiciary cannot avoid its duty. * * * They may not by interpretation add to or take from a clear and positive legislative mandate or substitute that which must be brought into existence by legislative mandate * * * but public policy or opinion should not sway the judiciary to read into a statute that which the Legislature might have inserted but did not. * * *".

The Legislature had an opportunity to expressly change or modify Section 71 S.C.T.A. They chose not to do so. This Court will not change Section 71 S.C.T.A. by implication in view of the fact that the Legislature, if it intended

to change Section 71 S.C.T.A., refused to expressly modify or change the mandatory requirements of said section.

Furthermore, an examination of Sections 70 and 71 of the S.C.T.A. indicates that they accomplish two different and distinct purposes and neither section is repugnant to the other. The responsibility for the strict compliance with said sections lies with two different taxing authorities, namely the County and the Town respectively.

Section 391, McKinney's Statutes provides at Page 412:

> "It is only where there is an irreconcilable conflict between the acts or where the subsequent act is clearly intended to supersede the former statute that a repeal by implication arises. To avoid a repeal by implication courts will narrowly construe a statute to keep it from conflicting with another, and when by a fair construction some office or function can be assigned to both acts, or they confer different powers for different purposes both must stand, though they were designed to operate on the same general subjects."

Defendants are also erroneous in their contention that plaintiffs' action is barred by Section 63 S.C.T.A. Section 63 basically provides that an action to attack the validity of an assessment must be commenced within two years from the date of the receipt of the warrant by the receiver of taxes.

The plaintiffs are not attacking the validity of the assessment. They admit that the assessment is valid and thus Section 63 has no application herein.

The only section of the S.C.T.A. which is germane herein with reference to a statute of limitation period is 53. However, this action has been brought within the statutory period provided therein and therefore Section 53 is not an issue.

The Court abhors a forfeiture. It will not permit the plaintiffs, who have timely acted, to forfeit their real property because of the failure of the taxing authorities to comply with the provisions of Section 71 S.C.T.A.

The tax sale and deed are hereby declared invalid.

Plaintiffs' cross motion is granted and defendants' motion is denied.

Settle judgment.

WILLIAM R. GEILER
J. S. C.

APPENDIX E

Memorandum Amending Memorandum of November 25, 1968

MEMORANDUM

Motion No. 2748 9-3-68
Index No. 164, 335

SUPREME COURT, SUFFOLK COUNTY
SPECIAL TERM PART I

WILLIAM ROGERS and ROSE ROGERS, his wife,

Plaintiffs,

vs.

PACT REALTY CORP., TOWN OF BABYLON OF THE STATE OF NEW YORK, CHESTER F. JACOBS as County Treasurer of the COUNTY OF SUFFOLK and the COUNTY OF SUFFOLK,

Defendants.

By GEILER, J.S.C.
Dated January 13, 1969

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Appendix E.

The Court, on its own motion, amends the decision dated November 25, 1968 to correct a typographical error on page 5 of the decision. The first sentence on page 5 shall read as follows:

"Pact's position is untenable . . ."

WILLIAM R. GEILER
J. S. C.